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IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

The Hope Clinic, Marilynn Conners Frederiksen, M.D., Norman A. Ginsberg, M.D., Cassing Hammond, M.D., Lauren Streicher, M.D., and David Zbaraz, M.D.,

Petitioners,

v.

JAMES RYAN, Attorney General of the State of Illinois, in his official capacity; and RICHARD DEVINE, State Attorney for Cook County, in his official capacity

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the "Illinois Partial-birth Abortion Ban Act" ("the Illinois Act") unduly burdens a woman's right to abortion.

2. Whether the Illinois Act is unconstitutional, because it fails to provide any exception to the ban when the prohibited methods of abortion are necessary to preserve the woman's health and because the life exception is too narrowly defined.

3. Whether the Illinois Act, which describes the banned procedures in broad terms that encompass many recognized abortion and obstetric techniques, is unconstitutionally vague.

4. Whether the Court of Appeals' reliance on the unknown device of a "precautionary injunction" to address the constitutional flaws in the Illinois Act is inappropriate and inadequate.

PARTIES INVOLVED AND RULE 29.6 LISTING

The parties in this matter are identified in the caption.

The Hope Clinic is a corporation that has no parent companies or subsidiaries.

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Petitioners, The Hope Clinic, Marilynn Conners Frederiksen, M.D., Norman A. Ginsberg, M.D., Cassing Hammond, M.D., Lauren Streicher, M.D., and David Zbaraz, M.D., respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in the above entitled case on October 26, 1999.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Hope Clinic v. Ryan,* 195 F.3d 857 (7th Cir. 1999). It is reprinted in the appendix to this petition at pages 1-60 (hereinafter "App. __"). The opinion of the United States District Court for the Northern District of Illinois is reported as *Hope Clinic v. Ryan*, 995 F. Supp. 847 (N.D. Ill. 1998), and is reprinted in the appendix, App. at 73-104.

JURISDICTION

Original jurisdiction in the United States District Court was based upon 28 U.S.C. §§ 1331 and 1343. The District Court declared the Illinois Act unconstitutional and enjoined its enforcement on February 12, 1998.

The State appealed this case to the United States Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C. § 1291. On August 13, 1999, the Court of Appeals ordered *sua sponte* that the *Hope Clinic* case, which had been briefed and argued but not decided, be re-argued to the court sitting *en banc*, in conjunction with *Planned Parenthood v. Doyle,* Nos. 99-2533, 99-2528, which challenged a similar Wisconsin abortion ban.

On October 26, 1999, the Seventh Circuit issued a five to four *en banc* decision upholding the constitutionality of both laws. With respect to the *Hope Clinic* matter, the Seventh Circuit vacated the District Court's judgment and remanded the case with instructions to enter a "precautionary injunction" aimed at preventing the enforcement of the Illinois Act against certain undefined abortion procedures; to dismiss petitioners' challenge to the civil liability provisions of the Act; and to otherwise enter judgment for respondents. Petitioners filed a timely motion for a stay of the mandate with the Seventh Circuit, which denied that motion on November 17, 1999 (App. at 63), by a five to four vote, and

again after reconsideration on November 30, 1999, this time by a five to five vote with newly appointed Judge Williams also voting to grant the stay, *Hope Clinic v. Ryan*, No. 98-1726, 1999 WL 1102205 (7th Cir. Nov. 30 1999); App. at 67-72.

On November 30, 1999, Justice Stevens granted petitioners' application for a stay pending the timely filing and disposition of a petition for certiorari. App. at 105. With the filing of this petition, the jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

THE CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Constitution of the United States, Article III, Section 2 (in pertinent part)

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States . . ..

* * *

Constitution of the United States, Amendment XIV, Section 1 (in pertinent part)

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Illinois Partial-birth Abortion Ban Act

Public Act 90-560

AN ACT concerning abortions.

Be it enacted by the people of the State of Illinois, represented by the General Assembly:

§ 1. Short title. This Act may be cited as the Partial-birth Abortion Ban Act.

§ 5. Definitions. In this Act:

"Partial-birth abortion" means an abortion in which the person performing the abortion partially vaginally delivers a living human fetus or infant before killing the fetus or infant and completing the delivery. The terms "fetus" and "infant" are used interchangeably to refer to the biological offspring of human parents.

§ 10. Partial-birth abortions prohibited. Any person who knowingly performs a partial-birth abortion and thereby kills a human fetus or infant is guilty of a Class 4 felony. This Section does not apply to a partial-birth abortion that is necessary to save the life of a mother because her life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering condition caused by or arising from the pregnancy itself, provided that no other medical procedure would suffice for that purpose.

§ 15. Civil Action. The maternal grandparents of the fetus or infant, if the mother has not attained the age of 18 years at the time of the abortion, may in a civil action obtain appropriate relief unless the pregnancy resulted from the plaintiff's criminal conduct or the plaintiff consented to the abortion. The relief shall include money damages for all injuries, psychological and physical, occasioned by the violation of this Act and statutory damages equal to 3 times the cost of the partial-birth abortion.

§ 20. Prosecution of woman prohibited. A woman on whom a partial-birth abortion is performed may not be prosecuted under this Act, for a conspiracy to violate this Act, or for an offense under Article 31 of the Criminal Code of 1961 based on a violation of this Act, nor may she be held accountable under Article 5 of the Criminal Code of 1961 for an offense based on a violation of this Act.

§ 99. Effective date. This Act takes effect 60 days after becoming law.

720 ILCS 513/1-513/99 (Supp. 1999).

STATEMENT OF THE CASE

The physician-petitioners, Drs. Frederiksen, Ginsberg, Hammond, Streicher, and Zbaraz, are obstetricians-gynecologists who are faculty members at Northwestern University Medical School. They provide medical services, including prenatal care, labor and delivery, fetal diagnoses and therapy, and abortion services, to their patients at Northwestern Memorial Hospital in Chicago. 995 F. Supp. at 849-50; App. at 75-76. Petitioner Hope Clinic provides reproductive health care, including abortions, to patients in downstate Illinois. *Id.* at 849; App. at 75.

Women need abortions for many reasons, including serious medical problems that complicate pregnancy, such as kidney failure, heart disease, and diabetes, as well as other compelling personal circumstances that include poverty, domestic abuse, sexual assault, extreme youth, fetal anomalies, or advanced maternal age. *Id.* at 851; App. at 79. *See also* Frederiksen Decl., App. at 153, 157-61. As with any medical procedure, physicians determine which method of abortion is appropriate for a particular patient after weighing many variables, including the woman's medical condition and prior surgical history, the duration of the pregnancy, the physician's skill and training, and the presence and nature of fetal anomalies. 995 F. Supp. at 851,

852; App. at 79, 81. Petitioners challenged the Illinois Act because they fear prosecution if they continue performing abortions, even on a non-viable fetus, using the standard methods of suction aspiration, induction, and any dilation and evacuation ("D&E") method, including the dilation and extraction ("D&X") variant. *Id.* at 857-58; App. at 94-95.

Illinois doctors are uncertain about the continued legality of these safe and common methods of abortion because of their understanding, as medical professionals, of the language of the Illinois Act. The Act does not "denote a specific abortion procedure" described in the medical literature. *Id.* at 851; App. at 79. Instead, it bans every abortion in which the physician "partially vaginally delivers a living human fetus or infant before killing the fetus or infant and completing the delivery." 720 ILCS 513/5.

Obstetricians understand the term "deliver," which is not defined by the Act, to mean removing something from a woman's uterus, whether it is a fetus, part of the fetus, the placenta, or a full-term infant. 995 F. Supp. at 854; App. at 86. In the obstetrical setting, physicians understand the term living, which also is undefined by the Act, to mean "having a heartbeat." *Id.* at 854-855; App. at 87. Relying on these uncontroverted expert attestations, the district court found that doctors understand the statutory language "partially vaginally deliver a living fetus" to ban any abortion procedure in which part of either a fragmented or still intact fetus is drawn from the uterus, through the cervix and into the vagina while the fetus still has a heartbeat. *Id.* at 854-855; App. at 86-88. This potentially occurs in every method of abortion that petitioners commonly use.[1]

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[1] Hysterectomy and hysterotomy, which involve surgical removal of the fetus through an incision in the woman's abdomen, rather than vaginal delivery, pose substantially greater risks to the woman's health and future fertility, and therefore are almost never appropriate. 995 F. Supp. at 853; App. at 83-84.

For example, in suction aspiration, the most common first trimester method, the physician delivers the living fetus, or part of it, from the uterus into the vagina through a suction tube. By continuing the suction, the physician causes fetal death and completes the delivery. On occasion, the fetus is removed intact. *Id.* at 851, 854-855; App. at 80, 87.

Induction, accounting for about five percent of second trimester abortions, essentially initiates pre-term labor with the use of medications. *Id.* at 851-52; App. at 80-82. It typically results in the delivery of an intact fetus. On occasion, during a breech delivery, the head lodges in the cervix. The physician then must compress the head, killing the fetus, to complete the delivery.

In the D&E method, which accounts for ninety-five percent of second trimester procedures, the physician delivers the fetus from the uterus using a combination of forceps, suction, and sharp instruments. *Id.* at 851; App. at 80-81. In many instances, the physician delivers part of the intact living fetus into the vagina before causing the "delivered" tissue to separate from the remainder of the fetus, which remains inside the uterus. The physician then continues to deliver and disarticulate parts of the fetus. This process generally causes fetal demise before the physician completes the delivery of the entire fetus.

In some variations of the D&E the physician delivers an entire fetus that is intact, or nearly so.[2] *Id.* at 851; App. at

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[2] One intact variation of the D&E is the D&X. As defined by the American College of Obstetricians and Gynecologists ("ACOG"), the D&X must include all of the following four elements in sequence:

1. deliberate dilatation of the cervix, usually over a sequence of days;
2. instrumental conversion of the fetus to a footling breech;
3. breech extraction of the body excepting the head; and

80. In fact, in every D&E, physicians strive to deliver the fetus as intact as possible, because that is safest for the woman patient. Although abortion is safer for a woman than carrying a pregnancy to term, there are potential complications associated with abortion, as there are with any medical procedure. By delivering the fetus relatively intact, the physician reduces the number of times he or she inserts surgical instruments into the uterus, thus lowering the risk of perforating the uterus. *Id.* at 852; App. at 81. Similarly, there are fewer sharp and exposed fetal bone fragments, thus lowering the risk that the woman's cervix and vagina will be lacerated. *Id.* And, in some cases, an intact fetal specimen makes it easier for the doctor to accurately diagnose a suspected fetal anomaly and advise the woman of the risk that the anomaly will recur in a future pregnancy. *Id.*

Based on this uncontested expert evidence, the district court struck the Illinois Act, finding that it potentially "bann[ed] the most common and safest abortion procedures . . . without regard for the viability of the fetus." *Id.* at 857; App. at 93. Applying the standards laid down in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the district court concluded that by banning these procedures the Act unduly burdened a woman's right to choose to have an abortion prior to viability. 995 F. Supp. at 860; App. at 99-100.

In reaching this conclusion, the district court rejected respondents' arguments that the Act should be read narrowly to ban the D&X method of abortion, as defined by ACOG, along with certain unspecified variations. Observing that the Act used broad terms which described many recognized abortion and obstetric techniques, the district court found that "[p]hysicians cannot determine whether the legislature

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4. partial evacuation of the intracranial contents of a living fetus to effect vaginal delivery of a dead but otherwise intact fetus.

ACOG Statement at 1; App. at 261.

intended to ban a specific practice or entire abortion procedures." *Id.* at 855; App. at 88. Therefore, the law was unconstitutionally vague. *Id.* at 856; App. at 91. Finally, the district court held that the Act was "invalid because it does not provide an exception to the ban when the woman's health, whether it be mental or physical health, is endangered, or when the alternative procedure would compromise her health." *Id.* at 860; App. at 100.

On October 26, 1999, in a five to four ruling, the Court of Appeals upheld both the Illinois and the Wisconsin law in a single written opinion. 195 F.3d 857; App. at 1-60. Conceding that the statutory terms were an "imperfect match" with the medical definition of any abortion procedure, the court opined that the laws, nonetheless, could be construed to ban just the D&X method or, perhaps, the D&X and unspecified "immaterial variations." *Id.* at 863, 865; App. at 8, 11-12. The Court of Appeals then held that the laws, if so construed, were not unduly burdensome of the abortion right, despite the prohibition of abortions prior to viability. *Id.* at 871-75; App. at 23-29. Similarly, the court held that the absence of a health exception did not render the laws unconstitutional. *Id.*

The majority also held that the laws were not unconstitutionally vague, although it acknowledged that the broad and indefinite terms of the laws "might be read to prohibit . . . [D&Es] or . . . abortion by induction . . .." *Id.* at 863; App. at 8. That reading of the Act, the majority conceded, would make it unconstitutional. *Id.* at 869; App. at 18-19. It thus ordered the district courts on remand to enter "precautionary injunctions," preventing the application of the state laws to "a normal D&E or induction . . .." *Id.* at 869; App. at 19. The majority anticipated that the "precautionary" orders would be temporary until such time as:

> the state has provided additional specificity, by statutory amendment, regulations, or judicial interpretation (which could arise either from civil litigation . . . or from criminal prosecutions in which the parties disagree about whether the medical procedure properly may be labeled a D&X).

Id.

Chief Judge Posner, writing a dissent joined by three other judges, concluded that the laws, which on their face encompassed safe and common methods of abortion used prior to viability, had the effect and purpose of unduly burdening a woman's right to choose to have an abortion. *Id.* at 885; App. at 51 (Posner, C.J., dissenting). By failing to incorporate health or adequate life exceptions, the laws "endanger[ ] the woman's health" in contravention of nearly three decades of Supreme Court abortion jurisprudence. *Id.* at 880; App. at 40 (Posner, C.J., dissenting).

The dissent also found that the state laws were unconstitutionally vague. *Id.* at 886; App. at 53 (Posner, C.J., dissenting). The majority's directive to issue "precautionary injunctions" not only conceded the vagueness of the laws, but also was inadequate to protect the constitutional rights at stake. Indeed, the dissent warned, "[n]o one knows what procedures constitute 'partial birth' abortion." *Id.* at 889; App. at 57. The dissent concluded by observing that "[a] peculiarity of abortion rights is that they require the assistance of a third party, the physician . . .." *Id.* at 890; App. at 59 (Posner, C.J., dissenting). And, "[w]hat physician would be fool enough, or hero enough, to risk a criminal prosecution in order to explore the precise meaning and outer bounds" of the Illinois statute, even if limited by the "precautionary injunction?" *Id.* at 889; App. at 59 (Posner, C.J., dissenting).

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS AN IMPORTANT QUESTION, ON WHICH THE CIRCUITS ARE SPLIT, ABOUT THE CONSTITUTIONALITY OF STATE ABORTION BANS.

A sharply divided *en banc* Court of Appeals for the Seventh Circuit upheld the constitutionality of an ambiguously worded Illinois abortion law that bans the use of safe and medically necessary methods of abortion prior to viability. 195 F.3d at 861; App. at 2. This decision conflicts with the decisions of the Eighth Circuit striking down three state abortion bans nearly identical to the laws at issue here and the decision of the Sixth Circuit concluding that a ban on certain methods of abortion was unconstitutional. *See Planned Parenthood of Greater Iowa, Inc. v. Miller*, 195 F.3d 386 (8th Cir. 1999); *Carhart v. Stenberg*, 192 F.3d 1142 (8th Cir. 1999); *Little Rock Family Planning Services, P.A. v. Jegley*, 192 F.3d 794 (8th Cir. 1999); *Women's Med. Prof. Corp. v. Voinovich*, 130 F.3d 187 (6th Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S. Ct. 1347 (1998).

Twenty-nine states have enacted abortion bans substantially similar to that of Illinois, and medical providers have challenged the bans in twenty states.[3] Aside from the Seventh Circuit and the Wisconsin district court, the only court to reach the merits of these bans that did not enjoin the law is a single panel of the Fourth Circuit, which granted a stay of the district court's decision permanently enjoining the Virginia ban. The Seventh Circuit's decision is out of step with the vast majority of judicial decisions on the

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[3] Congress has passed two similar bans, but President Clinton vetoed both.

constitutionality of these abortion bans and should be reviewed by this Court.

A. The Ruling Raises Uncertainty About The Continued Legality Of Many Safe Methods Of Abortion.

In upholding the Illinois law, the Seventh Circuit majority opined that the "partially vaginally delivers a living fetus" language of this statute "captures the idea, central to the D&X procedure, that an intact fetus moves from uterus to vagina before death occurs." 195 F.3d at 863; App. at 8. In stark contrast, the Eighth Circuit declined to read the identical language contained in the Arkansas law and substantially similar language in the Nebraska and Iowa laws to ban only a D&X abortion as defined by ACOG.[4] The Eighth Circuit held that such a limiting construction would "do violence to the words of the statute as enacted by the [Arkansas] General Assembly" because the "word 'partially' cannot, by the ordinary process of construction, be converted into 'all of the fetus except for the head.'" *Little Rock Family*

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[4] Each of the three statutes the Eighth Circuit held unconstitutional, like the Illinois statute, defined the prohibited activity to include an abortion in which the person performing the procedure partially vaginally delivers a living fetus before killing the fetus and completing delivery. *See* Ark. Code Ann. § 5-61-202(1997); Iowa Code Ann. § 707.8A(1)(d)(1999); Neb. Rev. Stat. § 28-326(9)(1999). In addition to the language above, the Nebraska and Iowa statutes include a statement that the term "partially delivers vaginally . . . means deliberately and intentionally delivering into the vagina a living unborn child, *or a substantial portion thereof* . . .." Neb. Rev. Stat. §28-326(9)(emphasis supplied); *See also* Iowa Code Ann § 707.8A (1). As the Eighth Circuit in *Little Rock Family Planning Services* concluded, in the context of these laws, the term "'partially' is not appreciably different from 'substantial portion'" and in any case, the two terms have the same effect. *Little Rock Family Planning Services*, 192 F.3d. at 798.

Planning Services, 192 F.3d at 795; *see also Carhart*, 192 F.3d at 1149-50.[5]

The majority's analysis also disregards the Illinois district court's findings of fact.[6] As the dissent recognized, the facts here, as in the three cases decided by the Eighth Circuit, establish that "it is extremely difficult, indeed probably impossible, to distinguish a 'partial birth' abortion from [other] methods of abortion." 195 F.3d at 879; App. at 39 (Posner, C.J., dissenting). Indeed,

> [i]n a standard D&E, part or all of the fetus often will still have a heartbeat, and so be 'living,' in the sense of the word apparently intended by the legislatures, when it emerges from the uterus. Therefore it is 'partially vaginally delivered,' just as in a D&X.

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[5] Indeed, the State of Nebraska has sought certiorari on the issue of whether the Eighth Circuit erred by not adopting the construction used by the Seventh Circuit. *See Carhart*, No. 99-830, Petition for Cert. at 8-11. The State of Iowa also recently sought certiorari on similar issues.

[6] The majority's summary disregard of the Illinois record is fraught with error. The majority, in violation of Fed. R. Civ. P. 52 and *Anderson v. Bessemer City North Carolina*, 470 U.S. 564 (1985), completely disregarded and even denied that the Illinois district court made findings, because that court relied on uncontroverted affidavit testimony. Instead, the majority chose to rely on extra-record materials, primarily speculation about the impact of the Indiana state partial-birth abortion law, which was not before the court; the internally inconsistent findings of the Wisconsin district court; and legislators' assumptions underlying these bans. The majority's approach also disregarded the true consensus of extra-record evidence. As the dissent observed, the findings of district courts around the country demonstrate that the bans reach an indefinite array of safe and common abortion procedures performed throughout pregnancy. 195 F.3d at 882-85; App. at 44-51 (Posner, C.J., dissenting).

Id. at 887; App. at 54 (Posner, C.J., dissenting).[7]

The Eighth Circuit credited similar extensive findings of the three district courts to the effect that suction aspirations, and D&Es potentially involved the "partial-vaginal deliver[y]" of a living fetus followed by fetal demise and completion of the delivery. *Little Rock Family Planning Services,* 192 F.3d at 798. The Eighth Circuit then properly applied *Casey* and *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), to these findings. Again, contrary to the Seventh Circuit, it concluded that the abortion bans unduly burdened the abortion right by prohibiting safe and commonly available methods of abortion prior to viability. *Carhart*, 192 F.3d at 1151; *Little Rock Family Planning Services*, 192 F.3d at 797-98; *Planned Parenthood of Greater Iowa*, 195 F.3d at 388-89.[8]

By upholding two state abortion bans, the Seventh Circuit created great uncertainty about the legality of safe and available methods of abortion in Illinois and Wisconsin. As a result, physicians may stop providing medically necessary services or alter their procedures to the detriment of their

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[7] The majority distorted the record when it states that "none of the [Illinois] physicians uses the D&X." 195 F.3d at 871; App. at 24. In their original affidavits, Dr. Frederiksen and Dr. Hammond both swore that they personally had performed numerous abortions in which they partially vaginally delivered an intact or largely intact fetus. App. at 153-54, ¶ 3; App. at 190-92, ¶¶ 27-33. Dr. Frederiksen presently uses the ACOG D&X method, when medically appropriate. App. at 136-38, ¶¶ 5-7, and Dr. Hammond performs D&X variants that do not involve conversion to a footling breech, App. at 175-78, ¶ 3, a procedure that the State at argument contended was an "immaterial variation" that it would prosecute. App. at 210. The Illinois Solicitor General also affirmatively stated during the argument that "[t]he statute is not limited to a D&X procedure consisting of the four elements as ACOG described them . . .." App. at 209.

[8] Because the Eighth Circuit concluded that the laws were unduly burdensome, it did not reach the vagueness or health and life exception issues. *See, e.g., Little Rock Family Planning Services*, 192 F.3d at 796.

patients' health and possibly their lives. This case provides the Court with an opportunity to provide guidance to the courts of appeals on pressing constitutional issues – an opportunity that is particularly timely given the five pending circuit court appeals that involve substantially similar abortion bans.[9]

B. Even A Ban Limited To D&X Abortions Poses Questions Warranting Scrutiny By This Court.

In upholding the Illinois ban, the majority assumed that the D&X offers no health advantages as compared to other procedures. 195 F.3d at 872; App. at 24-25. In doing so, the majority again ignored the factual findings of the Illinois district court to the contrary. *Id.* at 883; App. at 46 (Posner, C.J., dissenting). The majority then essentially applied a "rational basis" test to evaluate the law's constitutionality, rather than the more exacting undue burden standard demanded by this Court's precedents. *Id.* at 885; App. at 49-50 (Posner, C.J., dissenting).

The district court explicitly found, again based on uncontroverted expert submissions, that intact abortion procedures, including the D&X, reduce the risks of uterine perforation, cervical laceration, and infection, and can be advantageous when the woman and her physician desire fetal diagnostic testing. 995 F. Supp. at 852-53; App. at 81-83. ACOG also acknowledges that the D&X "may be the best or most appropriate procedure in a particular circumstance to save the life or preserve the health of a woman." ACOG

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[9] *Causeway Med. Suite v. Foster*, No. 99-30324 (5th Cir. Apr. 5, 1999)(briefing complete); *Rhode Island Med. Soc'y v. Whitehouse*, No. 99-2095 (1st Cir. Sep. 28, 1999) (stayed pending U.S. Supreme Court's resolution of related cases); *Planned Parenthood v. Farmer*, No. 99-5042 (3d Cir. argued Nov. 19, 1999); *Eubanks v. Stengel*, No. 98-6671 (6th Cir. argued Dec. 15, 1999); *Richmond Med. Ctr. for Women v. Gilmore, appeals docketed*, No. 99-2000 (4th Cir. Aug. 6, 1999).

Statement at 2; App. at 262. Even the Wisconsin district court acknowledged these benefits of the D&X. 195 F.3d at 882, 884; App. at 44, 47 (Posner, C.J., dissenting).

The Seventh Circuit's treatment of factual findings and its legal conclusions conflict with the principle firmly established by this Court in *Casey* and *Danforth:* that abortion regulations may not compromise the health of pregnant women by forcing them from safer to riskier abortion procedures. The majority did not review the record at hand in accordance with appropriate standards and missed the fact-specific evaluation mandated by *Casey* of whether the Illinois Act imposed an undue burden, including whether it posed a threat to maternal health. These important questions also warrant this Court's review.

II. THE SEVENTH CIRCUIT'S DECISION UPHOLDING THE ACT, DESPITE ITS FAILURE TO INCLUDE ANY HEALTH EXCEPTION OR AN ADEQUATE LIFE EXCEPTION, CONTRAVENES THREE DECADES OF THIS COURT'S ABORTION JURISPRUDENCE.

Decades of this Court's jurisprudence underscore that because abortion is a medical procedure, it is necessary to preserve a physician's discretion to "determin[e] how any abortion [is] to be carried out." *See, e.g., Colautti v. Franklin*, 439 U.S. 379, 387 (1979). Any abortion restriction must contain an exception that allows the physician to perform the otherwise banned procedures when necessary to preserve the woman's health or life. *Casey*, 505 U.S. at 880. The absence of any health exception and the circumscribed life exception raise significant questions about whether the

Illinois Act conforms to this Court's prior rulings.[10]

The comprehensive ban imposed by the Illinois Act applies at all stages of pregnancy, even prior to viability when the state lacks a sufficiently compelling reason to prevent the woman from having an abortion. *See Casey,* 505 U.S. at 879. The broad reach of these laws underscores their potentially devastating impact on women's health. As the dissent warned:

> [t]he statutes before us endanger pregnant women – and not only pregnant women who *want* to have an abortion. There is no exception for women whose physicians tell them you *must* have an abortion or die. It is true that if a "partial birth" abortion is necessary to save the woman's life, the statutes permit this. But if her life could be saved by another type of abortion, even one that threatened her health – that threatened to sterilize her or to paralyze her – then the physician would be committing a felony if he performed a "partial birth" abortion.

195 F.3d at 881; App. at 41-42.

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[10] As the dissent recognized, the Act fails to satisfy even minimal standards of due process because it is "irrational." 195 F. 3d at 880; App. at 40. It serves neither of the interests identified in *Casey* – "interests in the health of the woman and in protecting the potential life within her." 505 U.S. at 871. The Act undermines rather than protects maternal health. Even if the majority is correct that the Act should be narrowly construed to target only one procedure, the law does not save the lives of fetuses, but rather steers physicians and patients away from some methods of abortion to alternative, possibly riskier, methods. Thus, the inference to be drawn is that the Act makes a "statement . . . that fetal life is more valuable than women's health." *Id.* at 881; App. at 41. This purpose is impermissible under *Casey. Casey,* 505 U.S. at 878-79.

This case presents critical questions of life and death as they relate to a woman's exercise "of a constitutional right the Supreme Court has repeatedly recognized." *Hope Clinic*, 1999 WL 1102205 at *1 (7th Cir. Nov. 30 1999); App. at 72. (Wood, J., dissenting from denial of stay). The issue of whether any abortion ban must contain adequate health and life exceptions thus merits review by the Court.

III. THIS CASE RAISES AN IMPORTANT QUESTION ABOUT THE DEGREE OF SPECIFICITY THE CONSTITUTION REQUIRES IN LAWS RESTRICTING THE EXERCISE OF CONSTITUTIONAL RIGHTS.

This Court consistently has reiterated that vagueness is a particularly grave concern when a statute threatens to inhibit the exercise of constitutionally protected rights. Penal laws that restrict constitutional rights must define the offense "with sufficient definiteness such that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). *See also City of Chicago v. Morales*, ___ U.S. ___, 119 S. Ct. 1849, 1861 (1999) (due process requires that a legislature establish minimal guidelines to govern law enforcement); *Colautti*, 439 U.S. at 391-94 (abortion law unconstitutionally vague because physicians could not know from the law what different statutory terms meant).

The Illinois Act proscribes elements integral to many recognized abortion and obstetric techniques, leaving petitioners uncertain about which procedures the Act prohibits. This uncertainty is exacerbated by the Illinois Solicitor General's affirmation at argument that the Illinois legislature had wanted to make the statute "as broad as possible." 195 F.3d at 887; App. at 54 (Posner, C.J., dissenting). Indeed, the majority's explicit recognition that

the laws might be read to ban many methods of abortion, and its directive that a "precautionary injunction" is needed to prevent applications of the laws to "normal D&Es and inductions," *Id.* at 869; App. at 19 (Posner, C.J., dissenting), is "a tacit acknowledgement of the [the majority's] inability to give the statutes a plausible narrowing interpretation." *Id.* at 886; App. at 53 (Posner, C.J., dissenting). *Cf. Reno v. ACLU*, 521 U.S. 844, 884 (1997) (court "may impose a limiting construction on a statute only if it is 'reasonably susceptible' to such a construction"); *Smith v. Goguen*, 415 U.S. 566, 575 (1974) (federal court may not salvage a vague state law by inserting additional terms).

Even with the "precautionary injunction," the language of the Illinois Act remains "incurably ambiguous." 195 F.3d at 887; App. at 53 (Posner, C.J., dissenting). The majority did not define a "normal" D&E or induction and disputes over these terms inevitably will arise, see *infra* pp. 19-21. The Court thus should take this case to decide whether the Act, on its face, is drafted with sufficient clarity both to provide the Illinois physicians with the constitutionally required notice of which methods of abortion are banned, and prosecutors and judges with the requisite guidelines for enforcement.

IV. THE CIRCUIT COURT'S CREATION OF "PRECAUTIONARY INJUNCTIONS" TO REWRITE VAGUE STATE LAWS TRANSGRESSES ARTICLE III AND NULLIFIES THIS COURT'S VAGUENESS JURISPRUDENCE.

The "precautionary injunctions" devised by the majority unnecessarily provoke unresolvable jurisprudential dilemmas. Rather than adhere to this Court's traditional vagueness and abortion jurisprudence, the Seventh Circuit invented its own regime for reviewing and essentially rewriting state laws. This radical approach to judicial review

and the heretofore unknown remedial structure it creates will be urged upon district courts in context too numerous and complex even to prophesize. *See* 195 F.3d at 876; App. at 33 (Posner, C.J., dissenting). Review by this Court is needed to prevent the inevitable confusion that the "precautionary injunction" would produce in the lower courts.[11]

In essence, the majority directed that "state statutes be enjoined that it has not found either violate federal law or create a significant danger of such violation." *Id.* at 877; App. at 34 (Posner, C.J., dissenting). If the majority is correct that the laws are constitutional, a proposition petitioners emphatically reject, the "precautionary injunctions" would violate Article III. *See id. See also Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971) (judicial order can be issued only on the basis of a legal violation). If, however, as petitioners contend, the laws are unconstitutional, the majority should have affirmed the permanent injunction, as entered in accordance with Fed. R. Civ. P. 65, rather than create an ultimately ineffective device not recognized in equitable jurisprudence. *Cf. Grupo Mexicano deSarrollo, S.A. v. Alliance Bond Fund, Inc.*, ___ U.S. ___, 119 S. Ct. 1961, 1965 (1999) (inappropriate for federal court to order equitable relief unknown or unavailable to traditional equity practice).

The "precautionary injunctions" also create the potential for unnecessary and intractable conflicts between the federal and state judiciary. If, for example, the State prosecutes Dr. Frederiksen or Dr. Hammond in an effort to determine whether a particular D&E abortion may be labeled a D&X, these physicians will seek relief from the federal court which entered the "precautionary injunction." If the district court

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[11] Certiorari should be granted in this case even if the Court decides to review the constitutionality of either the Nebraska or Iowa abortion bans. Otherwise, the validity of the "precautionary injunction" regime will remain in doubt.

views the abortion procedure at issue as a "normal" D&E, the court may hold the state prosecutor in contempt. Potentially then, "[s]tate officials will be subject to federal contempt sanctions for failing to abide by a federal court's interpretation of the statutes that these officials, not federal judges, are charged with administering." 195 F.3d at 876; App. at 33 (Posner, C.J., dissenting).[12]

Alternatively, if the district court declines to use its contempt powers, then the "precautionary injunction" will have provided no shield at all for these physicians and their patients. The majority's decision thus would effect a radical and unapproved departure from this Court's approach, for the past twenty-seven years, of adjudicating the facial constitutionality of state abortion restrictions. From the beginning, this Court has rejected the notion that a physician should be forced to undergo prosecution to work out the true meaning of a state's abortion law. *See, e.g., Doe v. Bolton*, 410 U.S. 179, 188 (1973); *Danforth*, 428 U.S. at 62; *Colautti*, 439 U.S. at 679, n.3; *Casey*, 505 U.S. at 845. *See also Steffel v. Thompson*, 415 U.S. 452, 462 (1974) (a federal court's refusal to rule on a constitutional issue before enforcement of a statute places "the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding").

The "precautionary injunctions" are "by design insufficient to prevent irreparable harm." *Hope Clinic*, 1999 WL 1102205 at * 1 (7th Cir. Nov. 30, 1999); App. at 68

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[12] Recently confirmed Judge Williams joined the court during the stay proceedings and sided with the original four dissenters who believe the laws to be unconstitutional. *Hope Clinic*, 1999 WL 1102205 (7th Cir. Nov. 30 1999); App. at 67-72 (Wood, J., dissenting). Thus, the Circuit Court presently is split five to five on the constitutionality of these abortion bans, raising the possibility of a stalemate should there be an appeal from any of the "precautionary injunction" proceedings.

(Wood, J., dissenting from denial of stay). They afford no protection for the health of pregnant women who may need a particular type of abortion. *See id.*; App. at 69. Without review by this Court some women in Illinois "may find their health permanently impaired," *Id.*; App. at 69 (Wood, J. dissenting) because the physician "has no incentive to undergo the agony of a criminal prosecution merely in order to perform an abortion in a particular way." 195 F.3d at 889; App. at 58 (Posner, C.J., dissenting).

The Seventh Circuit created potential for real harm to women and doctors, as well as the risk of unnecessary tensions between the state and federal judiciary. These quagmires can be resolved only by this Court's review.

CONCLUSION

The Petition for Certiorari should be granted as to each of the questions submitted.

Respectfully submitted,

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